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82-642

No.

IN THE

Supreme Court of the United States

October Term, 1982

ANDRE FRANKS,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION,
a/k/a AMTRAK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Is it prejudicial error for the court to refuse to charge the jury on the provisions of the Federal Employers' Liability Act and the law applicable thereto in a case brought under the Act?

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28 U. S. C. § 1254(1) 2

Other Authority:

Devit and Blackman, 3 *Federal Jury Practice and Instructions*, 3rd Ed., § 94.01 et seq. 9

OPINIONS BELOW

There were no opinions delivered in the courts below with the exception of the Memorandum-Order of the United States District Court for the Eastern District of Pennsylvania denying plaintiff's Motion for New Trial. This Order is not reported and appears as Appendix A.

The Judgment-Order of the United States District Court for the Eastern District of Pennsylvania appears as Appendix B. The Judgment-Order of the United States Court of Appeals for the Third Circuit appears as Appendix C, and the Order of the Court of Appeals denying the Petition for Rehearing appears as Appendix D. These Orders are not reported.

JURISDICTION

The Judgment-Order of the United States Court of Appeals for the Third Circuit was dated and entered June 15, 1982 (Appendix C). The Petition for Rehearing was denied by Order dated July 12, 1982 (Appendix D).

The jurisdiction of the United States Supreme Court is invoked under 28 U. S. C. 1254 (1) (1966).

The basis for federal jurisdiction in the District Court was the Federal Employers' Liability Act. 45 U. S. C. 56.

STATUTE INVOLVED

The subject action arose and was determined under the provisions of the Federal Employers' Liability Act, 45 U. S. C. § 51-60, which provides in relevant part:

> § 51. Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter.

Apr. 22, 1908, c. 149, § 1, 35 Stat. 65; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

§ 54. Assumption of risks of employment

In any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents, or employees of such carrier; and no employee shall be held to have assumed the risks of his employment in any case where the violation by such common carrier of any statute enacted for the safety of employees contributed to the injury or death of such employee.

Apr. 22, 1908, c. 149, § 4, 35 Stat. 66; Aug. 11, 1939, c. 685, § 1, 53 Stat. 1404.

STATEMENT OF THE CASE

A. Summary of Proceedings

This action was brought under the Federal Employers' Liability Act to recover damages for injuries sustained by the plaintiff while employed by the defendant. The case was tried in the United States District Court for the Eastern District of Pennsylvania before a jury, which returned a verdict in favor of the plaintiff in the amount of $15,000. The Court thereupon reduced the award to $3750 in accordance with the jury's finding of 75% contributory negligence, and judgment was entered upon the verdict. Plaintiff's Motion for New Trial was denied.

Plaintiff appealed from this judgment to the United States Court of Appeals for the Third Circuit, which affirmed the judgment without opinion and denied plaintiff's Petition for Rehearing.

B. Statement of Facts

The plaintiff was injured while operating a large machine known as a tie plugger. This was an old machine which constantly leaked oil from its fittings. The defendant was fully aware of this condition. On the day of the accident, plaintiff was operating the tie plugger machine when it began to spew oil. The plaintiff and the machine became covered with oil, and the oil ran down onto the roadbed. When the plaintiff stood up to attempt to repair the leak, he slipped on the oil and as he fell he struck the accelerator pedal, causing the machine to start moving. Plaintiff was dragged along the roadbed until he was able to free his leg from the pedal.

At the close of trial, plaintiff submitted to the court his Request for Instructions, which included several points on the provisions and application of the Federal Employers' Liability Act (Appendix E). The trial judge did

not read any of plaintiff's requests, but instead delivered a charge which covered such items as burden of proof, weight of the evidence, comparative negligence and damages (A12-A31). Following the charge, plaintiff's counsel informed the trial judge that he had not defined negligence, nor made any reference to the Federal Employers' Liability Act in his charge (A31). The judge acknowledged the oversight (A31), and subsequently explained to the jury the general meaning of negligence (A33-A34). However, no reference was made at all to the Federal Employers' Liability Act during this supplemental charge, and in response to the renewed objection by plaintiff's counsel (A34), the trial judge stated that he was not going to "burden the jury" (A35). The jury returned a verdict in favor of the plaintiff, but in response to special interrogatories, found the plaintiff 75% contributorily negligent.

Plaintiff appealed on the grounds that the trial court committed reversible error in refusing to charge the jury on the provisions of the Federal Employers' Liability Act and the law applicable to a case under the Act.

REASONS FOR GRANTING THE WRIT

This Honorable Court should grant a Writ of Certiorari because, on an important question of substantive law under the Federal Employers' Liability Act, the United States Court of Appeals for the Third Circuit rendered a decision in conflict with the decisions of other federal and state courts on the same matter.

The decision of the Court of Appeals affirming the trial court's action of refusing to instruct the jury on the relevant provisions of the Federal Employers' Liability Act is contrary to the general rule that where the law governing a case is expressed in a statute the court in its charge should use the language of the statute. *Terminal R. Ass'n. of St. Louis v. Howell*, 165 F. 2d 135, 140 (8th Cir., 1948). In the case at bar, not only did the trial judge refuse to charge the jury on the law applicable to a case under the Federal Employers' Liability Act, he refused to even mention the Act.

In *Howell*, the railroad challenged the propriety of instructing the jury in the language of the Federal Employers' Liability Act. The Court of Appeals for the Eighth Circuit approved such instructions, stating in support thereof that:

> One of the primary duties of the court is to expound the law to the jury and this is done by means of instructions. The basic law governing this case is that which the court in this instruction quoted to the jury. Even in criminal cases it is held as a general rule that where the law governing a case is expressed in a statute the court in its charge should use the language of the statute.
>
> • • •

> It would be strange indeed if it could be said to be error to lay down the law in the exact language of the statute upon which the action is based. 165 F. 2d at 139-140.

In *Terminal R. Ass'n. of St. Louis v. Fitzjohn*, 165 F. 2d 473 (8th Cir. 1948), the Eighth Circuit reaffirmed its holding on reciting the relevant provisions of the Federal Employers' Liability Act in a charge on the Act. The Court said:

> It is not error for a Court to briefly state to the jury the statutory law upon which an action is based and then to point out the specific provisions of the Act which are being invoked in the cause on trial. Instead of being confusing, it is enlightening to the jury to understand what the basic law is, and it further tends to put the plaintiff's charge of negligence in the case on trial upon a more dispassionate basis if the jury understands that the lawmakers did not exaggerate the seriousness of that particular charge of negligence by enacting a statute especially covering the situation there complained of. 165 F. 2d at 480.

The general rule of informing the jury that the action is governed by the Federal Employers' Liability Act and reciting the pertinent provisions of the Act has been followed by other federal courts and state courts. See *Schirra v. Delaware, L & W R. Co.*, 103 F. Supp. 812, 820 (M. D. Pa. 1952); *Atlantic Coast Line Railroad Company v. McDonald*, 103 Ga. App. 328, 119 S. E. 2d 356, 359 (1961). The model jury instructions for cases under the Federal Employers' Liability Act also incorporate the pro-

visions of the statute. Devit & Blackman, 3 *Federal Jury Practice and Instructions*, 3d Ed. § 94.01; et seq.

The Court of Appeals for the Third Circuit, by approving the charge given by the District Court in the instant case, has departed from the decisions outlined above.

The trial judge refused to give the substance of plaintiff's Request for Instruction No. 1 (A8-A9), which stated that:

> This action is brought by Andre Franks against National Railroad Passenger Corporation under and by virtue of an Act of Congress, known as the Federal Employers' Liability Act. The rights which this Act creates are federal rights protected by federal rather than local rules of law. The pertinent provisions of the Federal Employers' Liability Act read as follows:
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of death of such employee, to his or her personal representatives, for the benefit of the surviving widow . . . and children of such employee . . . for such injury or death . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or *by reason of any defect or insufficiency, due to its negligence, in its* cars, engines, appliances, *machinery*, track, roadbed, works, boats, wharves, or other equipment (emphasis supplied).

It is the position of the plaintiff that in order for the jury to properly consider the issues involved in an action under the Federal Employers' Liability Act, the jury must

be apprised of the basic information contained in the above-quoted instruction. The instant case shows why it is so important to convey this information. The evidence proved that defendant provided the plaintiff with a machine that was so defective and worn that it was constantly leaking oil. Under these circumstances, defendant failed in its obligation under the Federal Employers' Liability Act to supply safe machinery. Accordingly, plaintiff was entitled to specific instructions on the provision of the Act imposing liability on the defendant for injuries resulting from defective machinery. The trial judge refused to give these instructions. The jury was never told that the defendant had a statutory obligation to supply safe machinery. In fact, they were never even told that a statute governed this case. In the absence of such instructions, the jury could not have understood what the obligation of the defendant was to the plaintiff, and the jury may have been led to erroneously conclude that there was no basis for plaintiff's theory of liability.

Specific instructions on the pertinent provisions of the Federal Employers' Liability Act are all the more important where, as here, the issue of contributory negligence is submitted to the jury. Under the rule of comparative negligence, the jury is entitled to consider all the circumstances which characterize the negligence of either party. *Sears v. Southern Pacific Co.*, 313 F. 2d 498, 501 (9th Cir., 1963). The jury here was not instructed on the law which characterized the negligence of the defendant, consequently the jury was given no basis for comparing the relative amount of fault of each party. Furthermore, the trial judge failed to charge the jury as requested by plaintiff (A9-A11) that assumption of risk is not a defense under the Federal Employers' Liability Act. 45 U. S. C. § 54. The facts of this case are a classic

example of assumption of risk. Plaintiff was doing nothing more than what his duties required him to do, that is, to operate the tie plugger machine despite the risk posed by the leaking oil. It was therefore necessary, in light of its decision to submit the issue of contributory negligence to the jury, that the trial court instruct the jury on the Act's provision regarding assumption of risk to dispel any false notions that plaintiff's use of the defective machine was contributory negligence.

The authorities are uniform that a party is entitled to specific instructions on his theory of the case. *Chicago & Northwestern Railway Company v. Rieger,* 326 F. 2d 329 (8th Cir., 1964); *Denny v. Montour R. Co.,* 101 F. Supp. 735 (W. D. Pa., 1951). In an action under the Federal Employers' Liability Act, this requires that reference be made to the provisions of the Act because it creates standards of negligence different from those at common law. The instructions must necessarily define liability to include a greater area than that at common law. *Hoyt v. Central Railroad,* 243 F. 2d 840, 843 (3rd Cir., 1957).

Since the Federal Employers' Liability Act has established a more protective principle for railroad employees than that of the common law, the judicial charge should employ and emphasize the language of the statute. See *Hausrath v. New York Central Railroad Company,* 401 F. 2d 634, 638 (6th Cir., 1968). This was not done in the case at bar. The District Court gave a general, abstract charge on the law of negligence and not once did the Court refer to the Federal Employers' Liability Act. This is contrary to the decisions of the federal and state courts cited herein and for this reason it is respectfully submitted that this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 80-291

ANDRE FRANKS

v.

NATIONAL RAILROAD PASSENGER CORPORATION a/k/a AMTRAK

Memorandum-Order

FILED AUG 19 1981

POLLAK, *J.* AUGUST 18, 1981

Plaintiff Andre Franks was awarded a jury verdict against his employer, AMTRAK, as a result of injuries sustained while working on defendant's railroad. The award was substantially reduced by the jury's finding that plaintiff was contributorily negligent.

Plaintiff has moved for a new trial.

The first assignment of error charges that I erred in not reading to the jury the words of the statute under which this action was brought, the Federal Employers'

Liability Act. The contention is without merit where, as here, I instructed the jury on each essential element of the claim described by the statute. Plaintiff has proposed no authority for the proposition that the Act need be presented *in haec verba*.

Plaintiff's suggestion that it was error to have charged the jury on comparative negligence at all is equally without merit: Defendant produced sufficient evidence of actions plaintiff might reasonably have taken to avert the accident to allow the issue to be submitted to the jury.

I have considered plaintiff's other assignments of error and find no basis to direct a new trial.

Accordingly, plaintiff's motion is hereby DENIED.

/s/ LOUIS H. POLLAK
Pollak, J.

APPENDIX B

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 80-291

ANDRE FRANKS

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK

Civil Judgment

Before HONORABLE LOUIS H. POLLAK:

AND Now, this 19th day of June 1981, in accordance with the verdict of the jury

IT IS ORDERED that Judgment be and the same is hereby entered in favor of Plaintiff, Andre Franks and against the Defendant, National Railroad Passenger Corporation, a/k/a Amtrak in the $3,750.00 together with costs.

BY THE COURT:

ATTEST: /s/ ROBERT MEISTERING
Robert Meistering
Deputy Clerk

ENTERED: 6-23-81
CLERK OF COURT

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2565

ANDRE FRANKS,
Appellant

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA
C. A. No. 80-0291

Submitted Under Third Circuit Rule 12(6)
June 7, 1982

Before: ADAMS and WEIS, *Circuit Judges*, and BLOCH, *District Judge**

Judgment Order

After considering all contentions raised by appellant, it is

* Hon. Alan N. Bloch, United States District Court for the Western District of Pennsylvania, sitting by designation.

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

BY THE COURT,

/s/ ARLIN M. ADAMS
Arlin M. Adams
Circuit Judge

ATTEST:
/s/ SALLY MRVOS
Sally Mrvos,
Clerk

DATED: Jun 15 1982

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 81-2565

ANDRE FRANKS,

Appellant

v.

NATIONAL RAILROAD PASSENGER CORP.,
a/k/a AMTRAK

Sur Petition for Rehearing En Banc

Present: SEITZ, *Chief Judge*, ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, HIGGINBOTHAM, SLOVITER and BECKER, *Circuit Judges*, and BLOCH, *District Judge* *

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having

voted for rehearing by the court in banc, the petition for rehearing is denied.

By THE COURT,

/s/ ARLIN M. ADAMS
Circuit Judge

Dated: July 12, 1982

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* Hon. Alan N. Bloch, United States District Court for the Western District of Pennsylvania, sitting by designation.

APPENDIX E

IN THE
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CIVIL ACTION No. 80-2091

ANDRE FRANKS

vs.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK

Plaintiff's Request for Instructions

The Learned Trial Judge is respectfully requested to instruct the jury as follows:

1. This action is brought by Andre Franks against National Railroad Passenger Corporation under and by virtue of an Act of Congress, known as the Federal Employers' Liability Act. The rights which this Act creates are federal rights protected by federal rather than local rules of law. The pertinent provisions of the Federal Employers' Liability Act read as follows:

> Every common carrier by railroad while engaging in commerce between any of the several States or Territories . . . shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce or, in case of death of such employee, to his or her personal representatives, for the benefit of the surviving widow . . . and children of

such employee . . . for such injury or death . . . resulting in whole or in part from the negligence of any of the officers, agents or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Act of 1908, Chapter 149; 35 Stat., 65 U.S.C., 51.

2. It is admitted in this action that at the time of the occurrence here involved, the defendant was a common carrier by railroad, engaging in commerce between the several states, and that Andre Franks' work was in furtherance of such commerce. The remedy for damages for injuries suffered, therefore, is an action brought pursuant to the cited Act of Congress.

3. In this case, as in all other civil action cases, the burden rests upon the plaintiff to prove to you by a preponderance of the evidence that the injury complained of was caused in whole or in part by the fault of the railroad. The mere fact that an accident occurred does not raise any presumption that the railroad was at fault, but negligence may be established by facts and circumstances surrounding the occurrence.

4. To clarify the phrase "in whole or in part", I charge you that if the negligence of the railroad played any part, even the slightest, in proximately causing or contributing to the injuries, it is liable to the plaintiff. *Rodgers v. Missouri Pacific R. Co.*, 352, U.S. 500, 77 S. Ct. 443.

• • •

11. (a) I charge you that if, from a consideration of all of the evidence, you find that the plaintiff has proved by a preponderance of the evidence, that the accident was

contributed to in the slightest degree by the negligence of the defendant railroad as I have defined it to you, then you must also consider whether the accident was contributed to by any negligence on the part of the plaintiff, as I have defined to you; and if you find that such is the case, then the further provision of the Federal Employers' Liability Act must be applied. The material portions of this section of the Act read as follows:

> In all actions hereafter brought against any such common carrier by railroad under or by virtue of any of the provisions of this chapter to recover any damages for personal injuries to any employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery; but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.
>
> . . .

11. (b) I charge you that the burden of proving contributory negligence rests upon the defendant railroad and this burden is similar to that which rests upon the plaintiff in proving negligence of the defendant; namely, that it must be proved by a fair preponderance of the evidence.

11. (c) I charge you that under the federal law here applicable, it is no defense to the plaintiff's action in whole or in part that the employee assumed any of the risks of his employment. The applicable section of the Act provides as follows:

> That in any action brought against any common carrier under or by virtue of any of the provisions of this chapter to recover damages for injuries to, or the death of, any of its employees, such employee shall not be held to have assumed the risks of his employ-

ment in any case where such injury or death resulted in whole or in part from the negligence of any of the officers, agents or employees of such carrier. . . . *April 22, 1908, c. 149 Sec. 4, 35 Stat. 66; August 11, 1939 c. 685, Sec. 1, 53 Stat. 1404.*

I charge you that every vestige of the doctrine of assumption of risk, no matter by what name it may be called, was obliterated from the law by this Act of Congress. *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 58, 57 L. Ed. 610, 612.

11. (d) I have charged you that contributory negligence on the part of the plaintiff constitutes a partial defense to the railroad and that you would have to reduce the plaintiff's damages proportionately if you found the plaintiff *was* contributorily negligent; I have also charged you, on the other hand, that assumption of risk by the plaintiff constitutes no defense whatsoever to the railroad and that you would not reduce plaintiff's damages at all if you find that he had voluntarily assumed the risk; you must, therefore, draw a clear line of distinction between these two!

An employee cannot be charged with contributory negligence simply because he assumed risk; the inquiry is, did his conduct depart from that of a reasonably prudent employee in his situation, *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 71; if he undertook to do the job he was directed to do, knowing that there was danger of injury in it, he is charged only with assumption of risk (which is no defense to the railroad) unless his conduct in so doing departed from that of a reasonably prudent employee under all of the existing circumstances.

APPENDIX F

Charge to the Jury

The Court: My friends, it is now my function to talk to you for a few minutes about the legal principles which you will apply in deciding this case. As I told you at the beginning, you and I are partners, your role being to determine the fact and I to tell you what the legal principles are within which those facts have application. I remind you that not only are you the deciders, you are the sole deciders of the facts. Nothing that I have to say about any of the testimony, nothing that Mr. Hankin or Mr. Gallagher has had to say is of any consequence. If you find our recollections unpersuasive then your recollection and your determination controls.

Now, this is a lawsuit between an individual, Mr. Franks, Andre Franks, and a corporation, the corporation which is familiarly known as Amtrak, more formally known as the National Railroad Passenger Corporation. I would remind you that all parties, whether they are persons or corporations or governments or trade unions or whatever they may be, all parties are entitled to equal justice in our courts. None of us is permitted, as a juror or as a judge, to have any special sympathy or affection for one kind of a party rather than another. We may like or dislike trade unions but a trade union is as much entitled to justice as anybody else and no more in a court. So too with a railroad and so too with a person of whatever station in life. So as between Mr. Franks and Amtrak, you are to treat both of them exactly the same, dispassionately.

Now, when you are dealing with a corporation, because a corporation is, by definition, inanimate—it's a construct of the law—and you find that a corporation is

charged, as Amtrak is in this case, with negligence, then, of course, you must make your determinations by thinking about how it is that a corporation acts. I will tell you in a few minutes what negligence is and what you are to look for in making that determination.

What does it mean to say that a corporation is negligent or not negligent? The question is: What does a corporation do through its agents or employees? Those are the persons who define a corporation's action and a question of negligence or other liability on the part of a corporation is simply a question of how that corporation's agents or employees acted or failed to act in the course of their duties on behalf of the corporation.

Now, you will be addressing the testimony which you have heard and the very few exhibits which will be with you in the jury room when you deliberate. Your job will be to determine where the truth lies and you will be thinking about the testimony you have heard and, beyond thinking about the exact words or your recollection of them, you will think about the natural inferences that flow from whatever information you have.

The information that you have comes from the witnesses. You may find as to some issues that you will have to choose between the testimony of witnesses, which testimony may seem to you not entirely consistent. You may get as to some issues a feeling that one witness has told you one thing and another has, viewing the same or similar activities or recollections, has given you a somewhat different version. Now, both of those may be entirely honest pieces of testimony. The witness' best recollection, observation—all of our witnesses are sworn and they are obliged under oath to do their best to tell you and me the truth. Any deliberate lie on the witness stand is a crime and a very, very serious crime, the crime

of perjury. We would certainly hope and expect that all of our witnesses have tried to tell us the truth, but as reasonable and responsible people who have very serious duties cast upon you, you will have to conside the possibility, to the extent that you find the testimony of one witness inconsistent with the testimony of another witness, you will have to consider the possibility that perhaps one witness has been less truth saying or has shaded the truth some as against another witness. That is a possibility. I can't think of any particular instances in this case which are going to compel you to that kind of unhappy conclusion but, obviously, in thinking about testimony and whether a witness is truth saying and reliable in that sense, you will want to give thought to whether the witness has any particular motive to misrepresent the facts or whatever.

Now, apart from questions of honesty, forthrightness, whether a witness is being truthful for you, there is the more subtle, but perhaps for the most part, more common set of judgments that you have to make, and here I'm talking about your role today as jurors, but I hope you realize that it equates very closely with the kinds of judgments that all of us make many times in our lives when we are having to determine matters of very great consequence to us or to others on the basis of what information we can get from friends or family or whatever.

There are human problems that depend on our getting information and making serious and responsible judgments and in drawing your conclusions today as to where the truth lies think about yourself as performing a duty just as important to the persons whose affairs, whose responsibilities, whose obligations you are resolving. Think about yourselves as performing a duty just as important to those persons as the duty which you perform when, for

your own concerns or those of your family, you make decisions about vital matters, whatever they may be.

In deciding where you are going to get reliable information, even without thinking about it, but now that I ask you to think about it I think you will recognize it, you will realize that you automatically say to yourself: Well, A says such and such and B says such and say which is rather different. On the whole, I think A was in a better position to observe or has a better memory than B or whatever or you may conclude that A is more reliable about some set of facts but not about another set of facts. That will be part of your job in this case in sorting out the facts from the various witnesses who have spoken to you. You may find that of particular importance in thinking about the expert testimony which you have heard. I'm not suggesting that the expert testimony is necessarily in conflict nor am I suggesting that the expert testimony is not in conflict. It will be up to you to decide whether everything that you have heard from the experts is consistent one with another. To the extent that you find inconsistencies, and inconsistencies about matters of consequence, then you will have to make determinations for yourself as to who is giving you what you would regard as the more reliable information with respect to some issue of importance and there you will pay attention to people's demeanor, intelligence, capacity to observe, opportunity to know the facts about which testimony has been given.

I have referred specifically to experts but, as I think I told you in the course of the trial, you will apply to them the same standards that you will apply to all witnesses in this case in determining who is most reliable for you, but you will recall that I did pay particular attention to expert testimony when we had our first expert on the stand and I want to repeat just a little of what I said then because

we have now had—well, let me see how many. I'm not sure I can count up right away, but we have had various physicians, including psychiatrists, but not limited to psychiatrists, have had various physicians, and we have also had an economist and these are persons, as I said, who the law allows to give opinions and also to be asked hypothetical questions, questions in which they are asked by counsel to assume that certain things are true and if such and such is true, then what judgment do you have about that set of facts within your specialty, but you will remember I admonished you when we were going through that process that if you as jurors say, well, the facts which that expert has been asked to assume are not the facts as we know them, as you, the jury, finds them, then having rejected the assumptions which the expert was asked to take into account, you may conclude that the expert's opinion isn't very helpful to you.

At all events, I don't want you to feel in any way bound to accept an expert's judgment just because that person comes to us with a Ph.D. or an M.D. or a lot of training and knowledge that we don't have but, at the same time, one wouldn't lightly reject the advice of an expert merely whimsically.

I would also point out to you, since questions I think were asked of experts on both sides of this case by each of the lawyers as to whether they were being paid for their appearance here as witnesses, the fact that a witness, an expert witness, is paid is commonplace and there is nothing disparaging about that. These are people of great professional competence whose name is very valuable and to the extent that their time and their professional skills are their stock in trade, it would really be inappropriate for them to be required to come and give of their professional skills for nothing, just as one couldn't routinely, I think, expect that one could go into a doctor's office because his

or her sign was out on the street and say, "I want to be treated for nothing," though many of us might find that a more convenient way to organize life than it now is, certainly a less expensive one. But I don't want you to feel that the fact that an expert is receiving compensation for the professional services of giving an expert's opinion, that there's anything bad about that.

You will be reviewing the testimony with a view to determining whether the plaintiff, Mr. Franks, has proved his case in the terms in which I will explain the nature of his case in a moment, whether he has proved his case by what the law calls a preponderance of the evidence. That is the burden which is on the plaintiff, establishing his case by a preponderance of the evidence.

Now, what does that mean? Let me point out at the outset that a preponderance of the evidence is a burden which is a considerably less demanding burden than the burden which in a criminal case is on the prosecution. As I think you know, when a person is charged with crime, the prosecutor cannot ask a jury for a verdict of guilty unless the jury is convinced beyond a reasonable doubt of the case made by the prosecution. In a civil case, a noncriminal case, in a civil case such as this, there is no such demanding burden of proof but there is a burden of proof, a preponderance of the evidence, which says, "Members of the jury, before imposing liability on a defendant in a civil case, you must be satisfied that the plaintiff has proved his or her claim against the defendant by a preponderance of the evidence," and all that means —it means this much, but it means no more—is that the plaintiff has established the case which he has the obligation to establish by a greater likelihood than the case being the other way, that more likely than not in the jury's mind the truth is as the plaintiff saw it rather than as the defendant saw it. Put in arithmetic terms, it

means a little more than half. That's what, and that's all, that a preponderance means. It doesn't refer to numbers of witnesses. It refers to your sense of the quality of—how should I put it?—the center of gravity of the evidence.

Now, I have said that this is a claim of negligence which the plaintiff makes and that is what he must show by a preponderance of the evidence, that the defendant railroad was negligent, and that that negligence caused injury to the plaintiff, Mr. Franks. That's the essence of the case.

Now I will say considerably more about that. I remind you again of what I said at the outset, that when one is charging a corporation with negligence one is, in effect, asserting that the behavior of one or more of the corporation's employees or agents, persons acting on behalf of the corporation, behaved in a negligent fashion.

Now I'm going to ask Mr. Feuer to distribute to each of you a piece of paper called a verdict form. Only one of these will go out with you when you actually retire to deliberate but I would appreciate it if each of you would take a look at one of these for the next few minutes while I'm giving you my further instructions. Permit me to apologize in advance for the not very elegant typing. The typing was done by one of my law clerks who is a superb lawyer but I think it's fair to say, at least in his absence, he's only a moderately good typist. He's a better typist than I am, but that says very little. The fact that the line at the bottom is written rather than typed at all you will have to put down to an error of mine.

Now, in the next few minutes I will be giving you an exposition of what negligence is and how it enters into this case as what it is that the plaintiff must establish by a preponderance of the evidence. I will explain this in terms of the verdict form which is before you. This ver-

dict form is a series of questions which you as the jury will have to give unanimous answers to and they, in effect, are a way of guiding your deliberations to address the particular questions which are critical.

Now, I have said to you that it is up to Mr. Franks through his witnesses to show that Amtrak—I'm using its colloquial name—was negligent and, further, that the negligence caused harm to Mr. Franks. If you determine both of those issues in Mr. Franks' favor then we will go on to consider the question of what damages may be owing to Mr. Franks as a result thereof. First I want to settle on the question of negligence.

The negligence which has been alleged by Mr. Franks arises from his claim that the defendant, Amtrak, required Mr. Franks as part of his job to operate a tie plugger, that machine of which you and I saw a copy yesterday, to operate a tie plugger whose hydraulic system was not in safe and proper operating condition in the sense that it was leaking badly, according to the plaintiff's testimony.

Now, Mr. Franks, through his attorney, Mr. Hankin, and his witnesses, Mr. Franks argues, in effect, that the defendant, Amtrak, first of all, failed to give Mr. Franks a safe place to work, namely, that allegedly defective machine, the tie plugger and, second, failed to give Mr. Franks adequate supervision and training with respect to how to maintain and repair that tie plugger, that assertedly unsafe tie plugger.

Now, you have heard the testimony. If you are persuaded that the defendant, Amtrak, through its employees and agents was not negligent then you will—looking now at the verdict form—you will write "no" in answer to the question "Do you find the defendant, National Railroad Passenger Corporation, Amtrak, negligent?" If it is your conclusion that Amtrak is not or has

not been negligent then you would write "no" and if you so conclude, that would be the end of the case and you would come back with a verdict for the defendant, Amtrak.

However, if you conclude by a preponderance of the evidence that defendant, Amtrak, was negligent in one or more of the ways that I have mentioned, you will write "yes" in answer to question one and then you will go on to question two.

Question two asks a slightly different question. Question two asks: "Did defendant's negligence," which you would, by hypothesis, have founder under question one, "Did defendant's negligence contribute in any way to the injuries suffered by Mr. Franks?" Or to put it another way, "Did Amtrak's negligence cause Mr. Franks' accident and resultant injuries?"

Now, in talking about whether the negligence caused the accident I do not mean that Amtrak's negligence must have been the only cause, provided that it was a contributory cause. So long as it was one of the causes, that would suffice to make out liability on the part of Amtrak to Mr. Franks; that is to say, if you find by a preponderance of the evidence that defendant's negligence played some part in causing the injuries suffered by Mr. Franks, you will write after question two "yes" on the verdict form or you will check "yes" on the verdict form.

If your answer is "no," if you do not so find by a preponderance of the evidence you will, of course, write or check "no" after question two.

Now, if you check "no" after question two, that ends your deliberations and you will return a verdict for the defendant, but if you write "yes" after question two, you will then go on to consider the third question. "Did negligence on Mr. Franks' part contribute in any way to the injuries suffered by Mr. Franks?"

Now, what is the reason for this question? The question here assumes, of course, that you will have already said "yes" to the first two questions, meaning that you will already have found that Amtrak was negligent in some respect and that that negligence at least contributed to the accident in which Mr. Franks was hurt. This question then goes on to say whether there was negligence on Mr. Franks' own part which also contributed to the accident.

You will recall from what Mr. Gallagher has said that it is the position of Amtrak and Mr. Gallagher's witnesses have, in Mr. Gallagher's view, put forward evidence to support this, that it is the position of Amtrak that this accident would not have happened if Mr. Franks had put the gears of the tie plugger which he was operating into neutral or had taken some other appropriate precaution. The question asked here, question three, is whether, at least in some part, it was negligence on Mr. Franks' part which contributed to this accident.

Now, in considering the question whether Mr. Franks was negligent in some fashion that helped bring about the injuries he suffered, you must bear in mind that on this single issue, unlike the rest of the case, on this single issue it is the defendant, Amtrak, which has the burden of proving by a preponderance of the evidence that negligence that it attributes to Mr. Franks. You see what happens here, I think. The plaintiff, Mr. Franks, has had the burden of showing that the railroad, Amtrak, was negligent in a way that caused injury to Mr. Franks. The railroad in response says: assuming we were negligent—we don't think we were negligent, but assuming we were negligent, and that in some way injured Mr. Franks, we think that Mr. Franks was also negligent and that that negligence contributed to the accident.

Now, clearly, if Amtrak was right, in your judgment, in saying that Mr. Franks was negligent and his negligence

was the sole negligence that caused the accident, then we never would have gotten past question two because you would already have concluded that it wasn't the negligence of Amtrak that contributed to this accident, but if you have already concluded (a) that Amtrak was negligent and (b) that that negligence contributed to Mr. Franks' injuries, then you have to consider whether there was also some negligence on Mr. Franks' part that contributed to Mr. Franks' injuries, but there it is up to Amtrak to bear the burden of proving by a preponderance of the evidence that Mr. Franks was negligent in some measure. As to the other issues that we have discussed so far you will, of course, remember that it was Mr. Franks who had the burden of proof.

Now, suppose you conclude that there was some negligence on Mr. Franks' part that contributed to his injury. I say suppose you concluded that. In a moment I will ask you to suppose that you didn't conclude that. But suppose you do. That would mean that you would have answered "yes" to question number three. Under those circumstances, this verdict form asks you to go on to question number four.

In answer to question four you have to say: Well, now, how much of the negligence was the railroad's and how much was Mr. Franks'? Was it half and half or was one of them more negligent than the other and, if so, how much more? Now, in asking this, I appreciate this is a kind of hard thing to quantify, but that's your job. The only guidance I can give you is that if you get to question four, that in allocating the percentages of negligence as between Amtrak and Mr. Franks, you have to be sure that they add up to 100 and that's why it says "Total—100 percent" under there. If you come up with two percentages that don't add up to 100, well, I'm not quite sure how I will proceed. I would implore you not to put that prob-

lem to me. Of course, my own arithmetic is so defective that maybe I wouldn't know the difference. Probably Mr. Hankin and Mr. Gallagher would point it out to me.

Now, I think you appreciate from what I have said that you only get to question number four if you have answered "yes" to question number three; that is, if you have said that Mr. Franks wasn't negligent in any way that contributed to the injuries, then you don't have anything to allocate. Then there wouldn't be any negligence on Mr. Franks' part to plug into question number four. So you only get to question number four if you have answered "yes" to question number three. If you answer "no" to question number three, you go directly to question number five.

You must begin to think this is like one of these board games like monopoly: "Go to jail. Go directly to jail. Do not pass go. Do not collect $200" or whatever. When I started playing monopoly several decades ago those sounded like large numbers, but inflation has changed all that. I still think of those as large numbers. But 100 percent remains 100 percent.

Now, whether or not you answer question four, you will, in any event, go on to answer question five in which you are asked to determine what damages Mr. Franks has suffered, what amount will compensate him, assuming, of course, that you have already determined that the defendant railroad was negligent and that that negligence cause injury to Mr. Franks, the determinations of which you would have made by "yes" answers to questions one and two. The reason for question four, assuming that you address question four, is that, in the event that you have found some contributory negligence on Mr. Franks' part, then the law that governs a case of this sort requires an allocation of the damages as between—based on your determination as to the allocation of negli-

gence. So that whatever figure of damages you would conclude were the damages suffered by Mr. Franks would then be reduced by such amount as you concluded the plaintiff was accountable for through his negligence, but that job of reducing the damages is not part of your work under question five, whether or not you deal with question four, whether or not, that is to say, you make any determination that there was negligence on Mr. Franks' part.

Under question five what you are asked to do is determine the actual amount of damages suffered by Mr. Franks and if Mr. Franks was not negligent at all, then he would receive an award of that total amount that you found to be the damages suffered by him, whereas if you concluded under question four that he was to some extent negligent, to that extent the award would be reduced. The question under question five is what damages were suffered by Mr. Franks.

Now, what do we mean by "damages"? Well, if you find that the defendant, Amtrak, is liable to Mr. Franks, that is to say, that Amtrak has been negligent and that the negligence has harmed Mr. Franks, if, in short, you have answered "yes" to questions one and two, then the law says a legal wrong has been done to Mr. Franks by the railroad, Amtrak, and at that point we turn to the question of damages owing to Mr. Franks. Of course, I have dealt already with the intermediate question of whether Mr. Franks has, to some extent, been contributorily negligent. That's what questions three and four are about. The chief purpose of damages is to compensate the victim of a legal wrong for the loss that he has suffered because of that wrong.

Now, in the nature of things it's usually impossible to determine that loss exactly. If you have found the defendant, Amtrak, liable to Mr. Franks, it will then be

your duty to make the best calculation which you can of the amount of money that would compensate Mr. Franks for the wrong done him, and this is, concededly, going to be an inexact calculation but it is not to be a speculation, just a guess. It must be your best, most honest effort to approximate those damages within the framework of certain categories.

Now, what are those categories? There are three kinds of damages which are claimed on Mr. Franks' behalf in this case. The first of these is called pain and suffering. The second is loss of past earnings, that is, earnings between the time of Mr. Franks' accident and now. The third is lost future earnings, from now forward.

You must ask yourself as to each of those three categories, pain and suffering, past earnings and future earnings, whether Mr. Franks has proved by a preponderance of the evidence damages of some amount and what that amount is.

Now, as to pain and suffering, I suppose of all forms of damage, this is the hardest to quantify. How do we measure pain and anxiety? We can't. In the nature of things, I think you will recognize that different people are differently affected by traumatic events, unhappy events. In terms of physical pain, people have different, as they call it, thresholds of pain and so to as to emotional pain. We react differently to different events. So the amounts of suffering and pain that are allocable properly by a jury will depend to some extent on the jury's estimate of the particular person before it and how badly that person has been hurt by what has happened to her or him.

As to past earnings, again, if you find by a preponderance of the evidence that Amtrak's negligence—and, by hypothesis, you will have found that Amtrak was negligent if you get this far to consider damages.

If you find by a preponderance of the evidence that Amtrak's negligence caused injuries which resulted in Mr. Franks' losing earnings because he hasn't been able to work between the time of the accident and now, then you will state that amount in your mind as a second item of damage in addition to pain and suffering; that is to say, loss of past earnings damages and the amount, of course, will be equal to the amount that the plaintiff lost.

If he was unable to perform the job that he used to have for the railroad but did something else which was much less well paying and only briefly, then, of course, that amount should be deducted in your mind from the gross amount which he was unable to earn at the railroad.

Now, finally, there's a category of lost future earnings. It is Mr. Franks' claim that he not only has been unable to work up to now, except very scatteredly, but his injury is of the sort which makes it difficult, perhaps not possible at all for him—I think there is testimony that may be understood as saying—to work at all now and for the foreseeable future. Clearly, there is a variety of testimony before you as to Mr. Franks' capacity to earn now and in the future.

If you find by a preponderance of the evidence that, as a result of Amtrak's negligence, Mr. Franks' future earnings will be impaired or lessened, then you should award as damages an amount to compensate Mr. Franks for his future loss of earnings.

If you find that Mr. Franks' injuries are permanent and if you find that, as a result, his earnings capacity will be permanently diminished as against what he would have earned had he not been injured, then you may award him a sum of money which will compensate him for his impaired earning power during the remainder of his expected work life. In that setting I will simply remind you of the testimony you heard from Dr. Verzilli, the economist, both

the direct testimony and also the testimony on cross-examination, as to the economics of Mr. Franks' projected work life. But, of course, Dr. Verzilli was not a witness who purported to know anything about Mr. Franks' own physical or emotional condition and, therefore, availability for work and, with respect to those matters, you will, of course, want to consider the testimony not only of Mr. Franks himself but of the various physicians, psychiatrists and orthopedic surgeons who testified.

Now, assessing damages for future loss of earnings is difficult for the reason, among others, that it involves a substantial amount of prophecy, but I instruct you that your prophecy must be reasonably grounded in actual evidence before you and on the preponderance of that evidence. You may not make an award of damages based on speculation. Here, as with all other elements of the case, except the question of whether Mr. Franks himself was contributorily negligent, the burden is on the plaintiff, Mr. Franks, to prove his case by a preponderance of the evidence.

Let me repeat that. Mr. Franks must prove the elements of damages by a preponderance of the evidence just as he must have proved the defendant's negligence by a preponderance of the evidence.

Now, with respect to all three of the elements of damages which I have discussed, pain and suffering, lost past earnings, lost future earnings, you will recall that there has been much testimony, including the expert testimony of the psychiatrists, Dr. Nichols and Dr. Harris, about Mr. Franks' emotional condition. Now, it is not my purpose to comment on that testimony. Yours is the function to assess that, but I do point out that, to the extent to which an injury causes suffering or impairs one's ability to work, the degree to which that is the case may well depend on one's emotional condition and I instruct you that,

in considering how much suffering or impairment of earning capacity befell Mr. Franks as a result of the defendant's negligence, the negligence which we are assuming for this purpose, you are to judge the matter from the perspective of a person with Mr. Franks' particular emotional makeup, whatever you find that to be; that is to say, the defendant railroad, Amtrak, which employed Mr. Franks takes Mr. Franks as he is and if the railroad through its negligence did injury to Mr. Franks, and this is, of course, what you will have previously found if you get to this issue of damages, then Mr. Franks is entitled to be compensated for the injuries reasonably suffered by him, a person with his particular set of strengths and weaknesses, whatever you find them to be.

Now, I have asked you in response to question five to set out as one number, one dollar figure, the total of the damages which you find Mr. Franks has proved by a preponderance of the evidence and those damages, as I say, may be pain and suffering, past lost wages and lost future earnings. As to each of those, it is plaintiff's burden of proof and what you are asked under question five is to set out all of those damages to the extent that you think plaintiff, Mr. Franks, has proved them, set them all out as one total number.

I now want to add one note of caution to you. Any award which is made to Mr. Franks in this case, assuming you do make an award to him, any award which is made to him is not income to him within the meaning of the federal laws with respect to income tax. It is not income to him with respect to the income tax laws. Therefore, should you find that Mr. Franks is entitled to an award of damages, then you should neither add to nor subtract from that award on the basis of some supposition that income taxes would have to be paid. Income taxes do not have

to be paid on any award received by Mr. Franks in this case.

That concludes my statement to you of the legal principles governing this case. You have been marvelously patient, perhaps just numbed into submission, but marvelously patient in listening to what I have had to say about the law. Now it is time for you to take up your work. You are about to retire to the jury room to commence your deliberations with a view to returning with a verdict and this form of verdict of which you will have just one copy in the jury room, you will come back with that and present it to the Court, to me, orally. You will read me what you have said with respect to these various questions and on that basis we will know what the judgment is which is to be entered.

Your verdict, your answers to these questions, are to be unanimous. All eight of you must join. That means, among other things, that you have a collective responsibility. You must deliberate together, you must talk with one another, share your feelings completely, pay each other the deference to listen to other points of view and also be respectful enough of your own point of view to express your viewpoint, be ready to change your viewpoint if you feel that somebody else has pointed out something that you didn't really appreciate.

On the other hand, don't yield up your opinion just because somebody else whom you like or somebody else who talks louder or six other people in the room say you are wrong. Being on a jury is not a popularity contest, I assure you. It is a place where it is your sworn duty to vote your conscientious conclusion. Your conscientious conclusion can change if reason from your colleagues leads you to change it, but it is not to change just to be agreeable or just to get done with the job or anything of that

kind. Anything of that sort would be inconsistent with your sworn oath.

I think it is clear from what I have said that what you will start to do is to talk, to talk with one another, and I suggest to you that your first job when you get into the jury room will be to select one among you to chair your deliberations, to be the forewoman or foreman leading you, and that person's chief responsibility, I suggest, will be to see to it that each one of you participates fully in your deliberations. Until you have completed your deliberations you must continue, as I have told you before, to say nothing to anyone outside the jury about the case, certainly not about how your deliberations are going.

It is possible—I think unlikely—but it is possible that you will have a question for me. If you have a question, whether I shall answer it and, if so, how, is something I will have to consult with Mr. Hankin and Mr. Gallagher about and I will only accept a question from you if it comes in writing from you expressing your written inquiry about something or other and you can communicate with me—I will be in my office—by sending a note through either my law clerk or my deputy clerk who will be in the office right next to your jury room. You won't be wholly cut off from the outside world. I doubt whether you will have any questions for me but, if you do, it is by written communication that you should get in touch with me.

In that event, after consulting with counsel I will either write back to you or I will ask you to come into the courtroom and respond to you there. I will imagine that I will not hear from you until you send me a message that you have a verdict and then I will advise the lawyers to that effect and, of course, Mr. Franks. I would advise Amtrak if it existed, if it were not an inanimate corporation, but it exists in the person of Mr. Gallagher. Then

we will ask you to come into the courtroom and I will receive your verdict from you.

Now, before I let you go I will consult for a second with Mr. Hankin and Mr. Gallagher to see if they have any parting thoughts.

(The following takes place at sidebar.)

Mr. Hankin: I'm afraid something very serious has been left out. You spoke about negligence but you never defined negligence or mentioned FELA.

The Court: You are absolutely right. I did not.

Mr. Gallagher: I have a lot, Judge. Should we start?

I take exception with regard to number one and two. You didn't give those charges.

The Court: All right.

Mr. Gallagher: Your Honor, I don't think you charged defendant is not an insurer. I think we are entitled to that.

The Court: I don't think you are, if I define negligence, which I did not do.

Mr. Gallagher: Maybe when you define it you are going to cover a lot of these. The mere happening of an accident—I would request that you charge we are not responsible for the happening of an accident.

We are not responsible for—I'm just going to refer to the number. Number five, number six I would request be charged, number seven, number eight, number nine.

The Court: Ten is the same thing.

Mr. Gallagher: Yes. I'm requesting number 11. That's the degree of care.

The Court: All of this goes to the same thing.

Mr. Gallagher: I don't remember. I know you talked about experts. You may have covered this.

The Court: All right.

Mr. Gallagher: I would ask number—did you cover that, your Honor, about false testimony? Was that covered?

Mr. Hankin: Come on.

The Court: I believe I indicated they could take part of a person's testimony.

Mr. Gallagher: I specifically would request number 20, your Honor.

The Court: That will be covered by what I have to say about negligence.

Mr. Gallagher: Mitigation of damages, I think I'm entitled to that. This is supplemental number two. Number two is mitigation of damages. Number three goes to the same point.

The Court: I didn't put it in mitigation of damages terms.

Mr. Hankin: There is no evidence that there was——

Mr. Gallagher: He has an obligation to mitigate them. That's a charge that we are entitled to.

The Court: I think I have a way of saying that.

Mr. Gallagher: Lastly, your Honor, when you talked about the future wage loss, I think I would request a charge that the Court make it clear that they are only to consider future wage loss if they believe he is not going to be able to work in the future.

The Court: Sure.

Mr. Gallagher: That's the only thing I would ask you to say.

(The following takes place in open court.)

The Court: I owe you an apology as well as counsel, as well as the parties, in that, as counsel kindly and graciously reminded me, I omitted to tell you what is really central to your considerations, namely, what negligence is. I have asked you to consider whether Amtrak was negligent to Mr. Franks. I have asked you to consider whether, as Amtrak asserts, Mr. Franks was negligent, but I haven't said anything to you about what negligence is and how can I put it except to say that that failure was negligence on my part.

What is negligence? Negligence is the failure to take reasonable care or it is the doing of an act which a reasonably prudent person would not do; that is to say, negligence may be an act of commission or an act of omission, but in either case it is a failure to live up to the standard of reasonable conduct of what you and I would accept, but I really mean you because you are the jurors and you are to determine what is reasonable, a failure to live up to the standard of behavior of what reasonably prudent persons would do. That failure to live up to that standard, as I say, may be by an affirmative action of some kind or it may be by a failure to take some precaution, and that is the determination which you must be making in deciding whether you were persuaded by a preponderance of the evidence, on the one hand, that Amtrak was negligent as regards Mr. Franks and, on the other hand, where Amtrak is bearing the burden of proof, whether Mr. Franks was negligent and thereby contributed to the accident which befell him.

I charge you that Amtrak, as Mr. Franks' employer, is not a guarantor of his safety nor does it owe to Mr.

Franks the highest possible duty of the most demanding care. It owes to Mr. Franks a duty of reasonable care; that is to say, it must not fail to do what a reasonable person would do in like circumstances, to insure, not in the sense of guarantee, but simply to make provision for the safety of somebody engaged in the occupation which Mr. Franks was engaged in.

I think I should say one word more about damages. In considering what damages may be owing to Mr. Franks for past lost wages, you must consider, as I think I told you, not merely what he would have earned had he been working for the railroad during this period of time, not merely what he, in fact, did earn in such employment as he had, but what could he reasonably have earned during this period if he had been attentively undertaking to be employed to the best of his ability. Of course, that will again raise the question "What was he capable of doing during this period?" And, clearly, there is a difference of view as between the plaintiff and defendant on that subject. That same kind of question, obviously, is involved in the question of looking into the future to decide whether Mr. Franks is entitled to damages or lost future earnings. You must make a determination of whether, indeed, Mr. Franks is incapacitated to some extent or at all from earning in the future and, if so, to what extent.

I think, unless counsel has any further word for me——

Mr. Hankin: Your Honor, I do.

(The following takes place at sidebar.)

Mr. Hankin: You didn't mention FELA nor did you refer to the FELA at all.

The Court: Tell me what it is we need on that.

Mr. Hankin: I think the act itself tells you what negligence is applicable.

Mr. Gallagher: I don't agree with that, not at this point. I agree that the act talks of negligence and negligence is defined by the law.

Mr. Hankin: This spells it out.

The Court: I don't see that there is anything I need to say more.

Mr. Gallagher: You defined negligence in the connotation of the railroad.

Mr. Hankin: It talks about any defect or insufficiency in its cars, engines, appliances, et cetera.

The Court: Due to its negligence.

Mr. Hankin: Yes.

The Court: I am respectfully going to not burden the jury. It might have been nicer if I had given them something about negligence in proper order but——

Mr. Hankin: I have an exception, your Honor.

The Court: All right.

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No. 82-642

IN THE

Supreme Court of the United States

October Term, 1982

ANDRE FRANKS,

Petitioner

v.

NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK,

Respondent

BRIEF IN OPPOSITION TO A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Was the Trial Court's charge to the jury, relating to a claim under the Federal Employers' Liability Act and the law applicable thereto, adequate insofar as stating the essential elements of such a claim and, therefore, not reversible error?

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STATEMENT OF THE CASE

The within action was tried before a jury between June 15, 1981 and June 19, 1981. The jury returned a verdict in favor of Plaintiff in the amount of $15,000.00, which was reduced by the Court to $3,750.00, in accordance with the jury's finding of 75% contributory negligence.

Plaintiff, Andre Franks, instituted the within action on or about January 21, 1980, alleging he sustained injuries while operating a machine known as a "tie plugger". Said action was instituted pursuant to the provisions of the Federal Employers' Liability Act, 45 U. S. C. § 51 et seq. Plaintiff sustained said injuries when he slipped on oil which he alleged leaked from the "tie plugger" machine.

At trial, conflicting evidence was presented regarding Plaintiff's use of the machine and the jury found the Plaintiff to be 75% contributorily negligent.

Plaintiff's Motion for New Trial was denied. Plaintiff appealed to the United States Court of Appeals for the Third Circuit, which affirmed the judgment and denied Plaintiff's Petition for Rehearing.

REASONS FOR DENYING THE WRIT

Petitioner avers that the Trial Court's failure to utilize the statutory language of the Federal Employers' Liability Act, 45 U. S. C. § 51, et seq., in its charge to the jury, as well as its failure to mention the particular statute by name, resulted in reversible error. Petitioner cites *Terminal R. Ass'n of St. Louis v. Howell*, 165 F. 2d 135 (8th Cir. 1948) and *Terminal R. Ass'n of St. Louis v. Fitzjohn*, 165 F. 2d 473 (8th Cir. 1948) for the proposition that when the law governing a case is expressed in a statute, the Court, in its charge, must use the language of the statute. Petitioner states that not only did the Trial Judge refuse to charge the jury on the law applicable to a case under the Federal Employers' Liability Act, he refused to even mention the Act.

Petitioner's reliance on the above mentioned cases is misplaced. These decisions reveal that the Trial Court used the statutory language of the Act in its charge to the jury. The defendant objected to the use of the statutory language, and the Circuit Court of Appeals for the Eighth Circuit held that the use of the statutory language was permitted in a charge to a jury.

The issue before this Honorable Court is not whether a Trial Court must employ the exact statutory language in its charge to a jury, but, rather, is the charge taken as a whole, so inadequate as to constitute reversible error? The Trial Judge, as well as the Court of Appeals for the Third Circuit, ruled that the charge to the jury was adequate. The Court of Appeals for the Seventh Circuit in *Menke v. Southern Ry. Co.*, 603 F. 2d 1281 (7th Cir. 1979), has ruled:

> This court has previously expressed its opinion that the setting forth of instructions in statutory language is a practice which is not to be commended. (Cita-

> tion omitted). On the other hand, "[i]n itself there is nothing improper in charging a jury in the language of a statute, when one of the issues in the case is whether the statute was breached." (Citation omitted). Thus, as with other matters concerning the form of instructions, whether to instruct the jury in the language of the relevant statute is generally a matter left to the discretion of the trial judge. *Id.* at 1284.

Thus, the law is clear that whether or not to employ the statutory language in a charge to a jury is left to the discretion of the Trial Judge. *Menke, supra.* As long as the charge fairly presents the necessary legal instruction, and the questions which the jury had to resolve, there can be no reversible error. *Robak v. Pennsylvania R. R. Co.*, 178 F. 2d 485, 486 (3rd Cir. 1949).

It is clear that there is no requirement that a federal jury must be charged by reading the formal language of the applicable statute. *Robak, supra* at 486. Furthermore, "a party has no vested interest in any particular form of instruction; the language of the charge is for the trial Court to determine. If, from the entire charge, it appears that the jury has been fairly and adequately instructed . . . then the requirements of the law are satisfied." *James v. Continental Ins. Co.*, 424 F. 2d 1064, 1065 (3rd Cir. 1970).

The learned Trial Judge fairly and adequately instructed the jury as to all of the elements regarding the Defendant's responsibilities to Plaintiff under the Federal Employers' Liability Act. The Trial Judge properly instructed the jury as to the degree of negligence needed to impose liability on the part of the defendant:

> Now in talking about whether the negligence caused the accident. I do not mean that Amtrak's negligence

> must have been the only cause, provided that it was a contributory cause. So long as it was one of the causes, that would suffice to make out liability on the part of Amtrak to Mr. Franks; that is to say, if you find by a preponderance of the evidence that defendant's negligence played some part in causing the injuries suffered by Mr. Franks, you will write after question two "yes" on the verdict form or you will check "yes" on the verdict form. . . .
>
> Now, what is the reason for this question? The question here assumes, of course, that you will have already said "yes" to the first two questions, meaning that you will already have found that Amtrak was negligent in some respect and that the negligence was at least contributed to the accident in which Mr. Franks was hurt. (N. T.: 5.65-5.66; Petitioner's Brief A20-A21).

The Learned Trial Judge properly instructed the jury as to all aspects of the law of comparative negligence as it applies to the instant action. The pertinent portion of the Judge's instructions to the jury on the law of comparative negligence was:

> You will recall from what Mr. Gallagher has said that it is the position of Amtrak and Mr. Gallagher's witnesses have, in Mr. Gallagher's view, put forward evidence to support this, that it is the position of Amtrak that this accident would not have happened if Mr. Franks had put the gears of the tie plugger which he was operating into neutral or had taken some other appropriate precaution. The question asked here, question three, is whether at least, in some part, it was negligence on Mr. Franks' part which contributed to this accident.
>
> Now, in considering the question whether Mr. Franks was negligent in some fashion that helped bring about

the injuries he suffered, you must bear in mind that on this single issue, unlike the rest of the case, on this single issue it is the defendant, Amtrak, which has the burden of proving by a preponderance of the evidence that negligence that it attributes to Mr. Franks.

Now, clearly, if Amtrak was right, in your judgment, in saying that Mr. Franks was negligent and his negligence was the sole negligence that caused the accident, then we never would have gotten past question two because you would already have concluded that it wasn't the negligence of Amtrak that contributed to this accident, but if you have already concluded (a) that Amtrak was negligent and (b) that negligence contributed to Mr. Franks' injuries, then you have to consider whether there was also some negligence on Mr. Franks' part that contributed to Mr. Franks' injuries, but there it is up to Amtrak to bear the burden of proving by a preponderance of the evidence that Mr. Franks was negligent in some measure . . .

Now, suppose you conclude that there was some negligence on Mr. Franks' part that contributed to his injury. I say suppose that you concluded that . . . . Under those circumstances, this verdict form asks you to go on to question number four.

In answer to question four you have to say: Well now, how much of the negligence was the railroad's and how much was Mr. Franks'? Was it half and half or was one of them more negligent than the other, and, if so, how much more? Now in asking this, I appreciate this is a hard thing to quantify, but that's your job . . . you have to be sure that they add up to one hundred and that's why it says [on the verdict form] "Total—100 percent" under there. . . .

> Now, I think you appreciate from what I have said that you only get to question number four if you have answered "yes" to question number three; that is, that you have said that Mr. Franks wasn't negligent in any way that contributed to the injuries then you don't have anything to allocate. Then there wouldn't be any negligence on Mr. Franks' part to plug into question number four [which requires an allocation of percentages of negligence]. So you only get to question number four if you have answered "yes" to question three . . .
>
> The reason for question four, assuming that you address question four, is that in the event that you have found some contributory negligence on Mr. Franks' part, then the law that governs a case of this sort requires an allocation of the damages as between—based on your determination as to the allocation of negligence. So that whatever figure of damages you would conclude were the damages suffered by Mr. Franks would then be reduced by such amount as you concluded the plaintiff was accountable for through his negligence, . . ." [N. T.: 5.66-5.70; Petitioner's Brief A21-A23].

Furthermore, the Trial Judge properly instructed the jury on Defendant's duty to provide employees, such as the Plaintiff with a reasonably safe place to work, as well as Defendant's duty to those engaged in Defendant's employment. The Learned Trial Judge's charge was, in pertinent part:

> Now, Mr. Franks, through his attorney, Mr. Hankin, and his witnesses, Mr. Franks argues, in effect, that the defendant, Amtrak, first of all, failed to give Mr. Franks a safe place to work, namely that allegedly defective machine, the tie plugger and, second, failed

> to give Mr. Franks adequate supervision in training with respect to how to maintain and repair that tie plugger, that assertedly unsafe tie plugger . . . However, if you conclude by a preponderance of the evidence that defendant, Amtrak, was negligent in one or more of the ways that I have mentioned, you will write "yes" in answer to question one [the question states, "Do you find the defendant, National Railroad Passenger Corporation, Amtrak, negligent?"] and then you will go to question two.
>
> . . . [I]t [Amtrak] owes to Mr. Franks a duty of reasonable care; that is to say, it must not fail to do what a reasonable person would do in like circumstances, to insure, not in a sense of guarantee, but simply to make provision for the safety of somebody engaged in the occupation which Mr. Franks was engaged in. [N. T.: 5.84-5.85; Petitioner's Brief A19-A20].

Petitioner further avers that the Learned Trial Judge failed to charge the jury that assumption of risk was not a defense under the Federal Employers' Liability Act, 45 U. S. C. § 54. Whether or not to give a charge on the assumption of risk is within the discretion of the Trial Judge. See e.g., *Dilley v. Chesapeake & Ohio Ry. Co.*, 327 F. 2d 249, 253 (6th Cir. 1964). Additionally, refusal to provide instructions on assumption of the risk is not error where the instruction on contributory negligence of a railroad employ, suing under the FELA, is correct. *Gowins v. Penna. R. R. Co.*, 299 F. 2d 431, 433 (6th Cir. 1962); *DePascale v. Penna. R. R. Co.*, 180 F. 2d 825, 827 (3rd Cir. 1950). In fact, many courts hold the assumption of risk charge should not be given at all, since assumption of risk is not an issue in a lawsuit brought under F. E. L. A. (See e.g., *Weese v. Chesapeake & Ohio Ry. Co.*, 570 F. 2d 611, 614 (6th Cir. 1978), and cases cited therein; *Gowins v. Pennsylvania R. R. Co., supra*).

In *Gowins v. Pennsylvania R. R. Co., supra* at 433, the Court held:

> Assumption of risk as a defense, where there is negligence on the part of the employer, has been written out of the Act. But when used in the sense that the employer is not liable for risks which it could not avoid in the observance of its duty of care, it has not been written out of the law. *Tiller v. Atlantic Coast Line R. Co.*, 318 U. S. 54, concurring opinion of Mr. Justice Frankfurther at page 72, 63 S. CT. 444, 453 87 L. Ed. 610 where it was said, "Because of its ambiguity the phrase 'assumption of risk' is a hazardous legal tool. As a means of instructing a jury it is bound to create confusion. It should therefore, be discarded." Assumption of risk was not pleaded as a defense by the appellee. Contributory negligence was pleaded by appellee and under that issue an instruction permitting the jury to consider appellant's actions in the light of a dangerous condition known to him was proper. Section 53, Title 45 U. S. C. A., *Chicago St. P. M. & O. R. Co. v. Arnold*, 160 F. 2d 1002 C. A. 8th. If the instruction on contributory negligence was a correct one, we do not think it was error to refuse to instruct on the question of risk, *DePascale v. Pennsylvania R. Co.*, 180 F. 2d 825, 827, C. A. 3rd.

Clearly the failure to charge on Section 54 of the FELA cannot constitute reversible error.

Having discussed the merits of Petitioner's argument, it should be further noted that Petitioner failed to make a timely objection or take a timely exception to the failure to charge the jury on Section 54 of the FELA. Rule 51 of the Federal Rules of Civil Procedure precludes a challenge to jury instructions on appeal when the party fails to

take an exception at time of trial. *Holloway v. J. S. Systems, Ltd.*, 609 F. 2d 1069, 1073 (3rd Cir. 1979).

Petitioner further complains that the Learned Trial Judge failed to refer to the FELA by name. It should be noted that not only did the Learned Trial Judge properly instruct the jury as to each and every element under the Act, he also took the time during the course of the trial to explain to the jury the applicability of the FELA:

> The law under which the plaintiff sues is a law of Congress, which provides for recovery in the event of negligence on the part of railways operating in interstate commerce where such negligence causes harm to persons who are employees of said railroads; that is, it is a special federal statute which deals with the protection of railway employees and that follows from Congress' authority to regulate railroads as instruments of the national commerce . . . [N. T.: 1.12].

Petitioner cannot complain that the Learned Trial Judge failed to specifically mention the FELA in its charge. To the contrary, although the Learned Trial Judge may not have mentioned the Act by Name, the Trial Judge did explain its significance to the jury.

Respondent submits that the United States Court of Appeals for the Third Circuit did not render a decision in conflict with the decision of other federal and state Courts on the same matter. The standard to be applied in such a case is whether the charge to the jury, taken as a whole, is adequate. If the charge to the jury is determined to be adequate, then the Learned Trial Judge's failure to employ specific statutory language or to mention the Act by name cannot constitute reversible error.

For all the above mentioned reasons, Respondent respectfully requests this Honorable Court to deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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NATIONAL RAILROAD PASSENGER CORPORATION, a/k/a AMTRAK,

Respondent

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

REPLY BRIEF OF PETITIONER

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REPLY BRIEF

On September 28, 1982, the Court of Appeals for the Ninth Circuit decided *Ragsdell v. Southern Pacific Trans. Co.*, which was reported shortly after the plaintiff filed his Petition for a Writ of Certiorari. Ragsdell sued under the Federal Employers' Liability Act and the Safety Appliance Act for injuries suffered in the course of his employment. He appealed from a jury verdict against him, claiming that the district court erred in refusing to give his requested instruction on the railroad's duty under the Federal Employers' Liability Act to provide him a safe place to work. The Court of Appeals for the Ninth Circuit held that the failure to instruct the jury regarding the railroad's duty under the Act to provide a reasonably safe place to work was reversibly erroneous. *Id.* at 1283. The Court went on to suggest that the following jury instruction is ordinarily appropriate in a case under the Federal Employers' Liability Act:

> An employer such as Southern Pacific has a continuous duty to exercise ordinary care under the circumstances to provide its employees with a reasonably safe place to work and with reasonably safe and suitable tools, machinery and appliances with which to work. In the absence of knowledge or notice to the contrary, an employee may rely on the assumption that the employer has exercised such care. *Id.* at 1283.

Ragsdell answers affirmatively the question presented by this Petition for a Writ of Certiorari; that it is prejudicial error for the court to refuse to charge the jury on the provisions of the Federal Employers' Liability Act and the law applicable thereto in a case brought under the Act.

In the case at bar, the Learned Trial Judge did not instruct the jury on the defendant's responsibilities to plaintiff under the Federal Employers' Liability Act. Nowhere in the charge is there any reference to defendant's duty to provide plaintiff with a safe place to work, and with safe and suitable tools, machinery and appliances with which to work. The Judge's refusal to give these instructions as requested by the plaintiff (Petitioner's Brief at A8-A9, A34-A35) is reversible error under *Ragsdell.*

Defendant asserts that the following portion of the Judge's charge properly instructed the jury on defendant's duties:

> Now, Mr. Franks, through his attorney, Mr. Hankin, and his witnesses, Mr. Franks argues, in effect, that the defendant, Amtrak, first of all, failed to give Mr. Franks a safe place to work, namely, that allegedly defective machine, the tie plugger and, second, failed to give Mr. Franks adequate supervision and training with respect to how to maintain and repair that tie plugger, that assertedly unsafe tie plugger. (Respondent's Brief at 6-7; Petitioner's Brief at 19).

This is not an instruction on the law governing this case. It simply reiterates plaintiff's theory of liability, which the jury had been told that it did not have to accept. The statutory basis of plaintiff's contention was never explained to the jury.

The only other instruction which the Learned Trial Judge gave regarding defendant's duties was during his concluding remarks on the meaning of negligence. The Judge stated:

> I charge you that Amtrak, as Mr. Frank's employer, is not a guarantor of his safety nor does it

> owe to Mr. Franks the highest possible duty of the most demanding care. It owes to Mr. Franks a *duty of reasonable care;* that is to say, it must not fail to do what a reasonable person would do in like circumstances, to insure, not in the sense of guarantee, but simply to make provision for the safety of somebody engaged in the occupation which Mr. Franks was engaged in. (Petitioner's Brief at A33-A34; Respondent's Brief at 7) (emphasis supplied).

This is an erroneous statement of the law under the Federal Employers' Liability Act. The employer's duty to provide a safe place to work is broader than the general duty to use reasonable care. *Ragsdell, supra* at 1283. The Learned Trial Judge's failure to define negligence broader than that at common law was prejudicial error. (See Petitioner's Brief at 11).

Defendant cites *Robak v. Pennsylvania R. R. Co.*, 178 F. 2d 485 (3rd Cir., 1949) and *Menke v. Southern Ry. Co.*, 603 F. 2d 1281 (7th Cir., 1979), for the proposition that there is no requirement that a federal jury must be charged by reading the formal language of the applicable statute (Respondent's Brief at 2-3). Defendant has misconstrued these cases. In *Robak*, the Court held that the trial judge is not required to read *points for charge* which are couched in formal language. *Id.* at 486.

The significance of *Robak* insofar its application to the instant case is that the trial judge did tell the jury that recovery was sought under the Federal Employers' Liability Act. *Id.* at 486. The Learned Trial Judge did not mention the Act in the case at bar. Contrary to defendant's contention, the Judge's reference to the Act during the course of trial (Respondent's Brief at 9) does not constitute an instruction and is not sufficient.

In *Menke*, the Court held that the trial court's reliance upon statutory language was not prejudicial error when one of the issues in the case, as it is in the case at bar, is whether the statute was breached. *Id.* at 1284. Plaintiff does not contend that jury instructions should employ cumbersome, formalistic statutory language. On the other hand, the law which is embodied in a statute cannot be ignored, as it was in the instant case.

For the reasons set forth above and in the Petition, it is respectfully requested that this Honorable Court grant a Writ of Certiorari.

Respectfully submitted,

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